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No. 94-691

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In the Supreme Court of the United States

OCTOBER TERM, 1994

JAY GREGORY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that respondent Compensation Board of the Commonwealth of Virginia did not receive adequate notice of, or opportunity to respond to, the instant lawsuit.

2. Whether the court of appeals erred in not dismissing the back pay award when it reversed the district court's granting of the joinder motion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is unpublished, but the judgment is noted at 27 F.3d 564 (Table). The opinion of the district court (Pet. App. 11-18) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1994. A petition for rehearing was denied on July 1, 1994. Pet. App. 19-20. The petition for a writ of certiorari was filed on September 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June, 1983, the United States brought a lawsuit against Jesse W. Williams, Sheriff of Patrick County, Virginia, in his official capacity, alleging that the Sheriff discriminated against women seeking employment as deputies, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and seeking relief that included back pay. In November, 1983, petitioner Jay Gregory defeated Jesse Williams in the election for Sheriff of Patrick County. Petitioner was thereafter substituted as the defendant sheriff. Pet. App. 2-3.

Petitioner moved for summary judgment contending, inter alia, that the United States had failed to join as a defendant the respondent Compensation Board of the Commonwealth of Virginia (Board). The United States opposed the motion, stating that the Board was not an indispensable party. Pet. App. 3. After the United States learned that the Board reimburses the county for paying the salaries and expenses of petitioner's office, the United States moved for joinder of the Board and the county board of supervisors. The district court deferred ruling on the motion. *Ibid.*

The district court granted petitioner's motion for a directed verdict, concluding that deputy sheriffs in Patrick County fell within the "personal staff" exemption of Title VII. Pet. App. 3. The court of appeals vacated that judgment and remanded the case for reconsideration in light of an intervening decision by that court on the scope of the "personal staff" exemption. *Ibid.*

On remand, the district court ruled that petitioner had unlawfully discriminated against one complainant and awarded her back pay. The court again denied relief in

other respects, holding that road deputy positions fell within the personal staff exception, and that petitioner's requirement that only males could serve as correctional officers was a bona fide occupational qualification. The district court also ruled on the outstanding motion to dismiss for failure to join the Board, stating that "although joinder might have been desirable, it was not necessary." Pet. App. 3-4. The court of appeals reversed, concluding that the district court's rulings on both the road deputies and the correctional officers were wrong. *Id.* at 3, citing *United States* v. *Gregory*, 818 F.2d 1114, 1116-1118 (4th Cir.), cert. denied, 484 U.S. 847 (1987).

On remand for the second time, the district court ruled that petitioner had not discriminated against the two remaining female applicants for deputy positions. Pet. App. 4; see *United States* v. *Gregory*, 726 F. Supp. 640 (W.D. Va. 1988). The court of appeals reversed, based on its finding of clear evidence of discrimination, and remanded the case for an appropriate remedy, to include back pay. Pet. App. 4, citing *United States* v. *Gregory*, 871 F.2d 1239 (4th Cir. 1989), cert. denied, 493 U.S. 1020 (1990).

On remand for the third time, petitioner moved, pursuant to Fed. R. Civ. P. 19, to join the Board as a party defendant, contending that complete relief could not be afforded absent such joinder. Pet. App. 4. The Board objected to the motion. The United States did not oppose petitioner's motion, but it disagreed with petitioner's contention that joinder was required because complete relief could not be obtained in the Board's absence, asserting instead that "backpay was rightly payable" by petitioner as well. *Ibid.*

On May 14, 1991, the district court denied the joinder motion, finding that it would be "procedurally inappropriate" to join the Board at that time. The court

noted that "the proper procedure would be to proceed with the present defendant, the Sheriff" as the sole defendant and render judgment; thereafter, "the United States may then use the processes of [the district court] to effect collection of any amounts due [it]." Pet. App. 4. The court entered judgment against petitioner in his official capacity on March 25, 1992, enjoined him from further discrimination, and granted back pay to the two remaining discrimination victims. *Ibid.*

On April 14, 1992, petitioner renewed his motion under Rule 19 to join the Board as a defendant. The Board again opposed the motion, and the United States again did not oppose, although it stated that the dispute was between petitioner and the Board. On June 19, 1992, the district court deferred ruling on the joinder motion "for the purposes of execution of judgment" until "all proper parties have been identified." Pet. App. 4-5. On September 11, 1992, petitioner again moved for joinder under Rule 19, seeking to add the Commonwealth of Virginia, by and through its comptroller, and the members of the Board. Pet. App. 5. The Board and the United States adhered to their earlier positions regarding joinder. *Ibid.*

On December 2, 1992, the district court granted petitioner's motion to join the Board, held that petitioner was an officer of the Commonwealth for purposes of this matter and ordered the Commonwealth, in effect through its Board, to fund the damages award. Pet. App. 16.[1] The

[1] The district court's order is couched in terms of ordering joinder of, and payment by, the "Commonwealth," but the district court used that term as a shorthand reference to the Board (see Pet. App. 13). Joinder of the Board is, in effect, joinder of the Commonwealth because the Board is the entity of the Commonwealth that would in fact authorize payment from the state treasury as it does for payments for the sheriff's expenses. See

court noted that the sheriff maintains a closer nexus with the Commonwealth than with the county, that the Commonwealth pays the salaries and expenses of the sheriff and his deputies, that the county contributes nothing to the sheriff's budget, and that state statutes govern the sheriff's authority to hire and discharge deputies. *Id.* at 15-16. The district court rejected the assertion by the Board that joinder violated its right to notice and an opportunity to be heard, stating that "[a] suit against a state officer is tantamount to a suit against the state itself. As such, no due process rights have been violated." *Id.* at 17, citing *Kentucky* v. *Graham*, 473 U.S. 159 (1985).[2]

2. The court of appeals reversed. Pet. App. 1-10. The court first noted that petitioner and the United States argued that the court need not decide the joinder issue because petitioner was sued in his official capacity as sheriff, and that the district court order was based on the

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Pet. App. 3, n.1 (explaining the "somewhat complicated" scheme by which the Commonwealth of Virginia funds a sheriff's expenses through Board reimbursement of the county).

[2] The district court rejected the Board's Tenth and Eleventh Amendment arguments, stating that "pursuant to its powers under the Fourteenth Amendment and the Supremacy Clause of Article VI of the Constitution, Congress abrogated these amendments when it enacted Title VII of the Civil Rights Act of 1964." Pet. App. 17. The district court correctly determined (*ibid.*) that the extension of Title VII to include state and local governments is constitutional. See, *e.g.*, *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976) (a State's immunity may be abrogated by Congress under Section 5 of the Fourteenth Amendment, which grants Congress authority to "enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority"); see also *Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Hutto* v. *Finney*, 437 U.S. 678 (1978).

conclusion that petitioner was acting as a state official so that the Commonwealth's Board was liable for any monetary remedy resulting from petitioner's discriminatory conduct. *Id.* at 6. The court declined, however, to reach the "thorny question of whether the Commonwealth of Virginia is the real party in interest in an official-capacity suit against one of the Commonwealth's sheriffs." *Ibid.*[3]

The court of appeals held that regardless of whether the Commonwealth was the real party in interest, it could not be held liable in this case because it did not have adequate notice of the suit or an opportunity to respond before it was held liable for the actions of its agents. Pet. App. 2, 6. The court stated that official capacity suits impose liability on the entity represented by the defendant as long as the entity receives notice and an opportunity to respond. *Id.* at 6-7, citing *Kentucky* v.

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[3] Petitioner acknowledges that the court of appeals declined to determine whether petitioner is a state officer, but petitioner asserts that that fact is "inescapable," pointing to Virginia law. Pet. 12-15 & n.1. The Board disagrees, contending that Virginia sheriffs are not state officials. Resp. Board Br. in Opp. 11. Petitioner does not, however, seek this Court's resolution of the issue and it is not included in the questions presented for review. See Pet. 1-2.

This case does not raise the question pending before the Court in *Swint* v. *Chambers County Comm'n*, No. 93-1636 (argued Jan. 10, 1995). In *Swint*, the question presented is whether an Alabama county sheriff is a final policymaker for a county in matters of law enforcement for purposes of county liability under 42 U.S.C. 1983. Because this case is an employment discrimination lawsuit arising under Title VII, which expressly applies both to States and local governments, it does not raise the same issues as does *Swint* concerning the location of "final policymaking authority" for purposes of Section 1983. Nor does it raise any Eleventh Amendment questions. See note 2, *supra*.

Graham, 473 U.S. 159, 166 (1985); *Brandon* v. *Holt*, 469 U.S. 464, 471-472 (1985). The court found that "[g]iven the particular facts of this case, and due in large part to the vacillation of the United States and [petitioner] as to whether the Board should have been added," the Commonwealth's Board "simply was not provided adequate notice of, and an opportunity to respond" to the suit as required by *Graham* and *Brandon*. Pet. App. 7.

The court reasoned that the mere legal fact (assuming it is such in this case) that a suit against an officer is a suit against the Commonwealth does not constitute notice to the Commonwealth and an opportunity to respond to allegations. The court stated that "the Board had many good reasons to believe under Virginia law that it was not responsible for the Sheriff's actions," and identified various state legal authorities suggesting that view. Pet. App. 7-8.[4] The court also contrasted the circumstances of this case, in which the Board's interests were never represented during the "crucial years of trial and appeal," with a case against Virginia electoral board members and general registrars in which a state official had been sued and represented by the Office of the Attorney General, the Commonwealth had filed a brief and appeared at pretrial oral argument as amicus curiae, had appeared at a post-trial hearing on motions, and had

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[4] Although the court of appeals assumed, arguendo, that a suit against petitioner was a suit against the Commonwealth, it also discussed various aspects of Virginia law that could have led the Commonwealth to believe that petitioner and other county sheriffs are independent officers under Virginia law and not officers of the Commonwealth or of the county. Pet. App. 7-8. As noted above, the court did not resolve what it termed "the thorny question" of whether the Commonwealth is the real party in interest in an official-capacity suit against a Virginia sheriff, and petitioner does not present that question for this Court's review. See Pet. 1-2.

filed additional briefs thereafter. *Id.* at 8-9. The court reasoned that, in the present case, the Board was not able to contest issues regarding whether discrimination occurred, mitigation of damages, or the accuracy of the back pay award. The court found that the Board was contacted only to shift the sheriff's liability to the Board as indemnitor. The court concluded that imposing liability on the Board would stretch "the procedural laxity permitted in official-capacity suits so far as to violate even the most elemental requirements of procedural fairness expressly required by the Supreme Court in *Brandon* and *Graham*," and it refused to do so. *Id.* at 9.

The court of appeals stated that on remand the United States may proceed against petitioner's office for execution of the judgment, but "[a]s the United States has consistently maintained, the ultimate responsibility for payment of the damage award in this particular case is a matter between the Sheriff and the Commonwealth." Pet. App. 10.[5]

ARGUMENT

1. Petitioner contends (Pet. 11-22) that the court of appeals misapplied the requirement set forth in *Kentucky* v. *Graham*, 473 U.S. 159 (1985), and *Brandon* v. *Holt*, 469 U.S. 464 (1985), that an entity be given notice and an opportunity to respond to a lawsuit before being held liable. Petitioner claims (Pet. 12-20) that the Board had notice and had at least three opportunities to participate in the district court proceedings prior to imposition of liability.

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[5] The court of appeals declined to reach the Board's arguments under the Tenth and Eleventh Amendments. Pet. App. 10 n.5.

Petitioner correctly points out that the record reveals that the Board had adequate notice of, and an opportunity to respond to, the United States' lawsuit. In November, 1983, prior to trial, the United States deposed Charles K. Trible, a member of the Board, regarding the funding of Virginia Sheriffs' offices. Mr. Trible was represented by an attorney from the Virginia Attorney General's office. See Pet. 15; Pet. App. 9 n.4. Also, the issue of the Commonwealth's liability for back pay awards arose many times during the course of the litigation prior to the district court's order of December 22, 1992, joining the Board as a defendant. See Pet. 16-20. Moreover, the Commonwealth, through the respondent Board, in fact reimbursed the county for the back wages awarded to one discrimination victim in July, 1986, and for the cost of legal counsel representing petitioner. See Gov't C.A. Br. 19; Pet. App. 9 n.4. In these circumstances, we believe that the Commonwealth not only had adequate notice (as the court of appeals appears to acknowledge, see *ibid.*), but also had adequate opportunity to dispute its liability for the back pay awards now in issue. Accordingly, under this Court's decisions in *Brandon* and *Graham*, the district court properly joined the Commonwealth's Board as a third-party defendant.

Nonetheless, we do not believe that the court of appeals' decision reversing the district court's joinder order warrants this Court's review. The court of appeals' opinion specifies that "the United States * * * may fully avail itself of the processes of the district court to execute on its judgment against the Sheriff's Office [and that] the ultimate responsibility for payment of the damage award in this particular case is a matter between the Sheriff and the Commonwealth." Pet. App. 10. We believe that under state law governing the funding mechanism for petitioner's expenses (see *id.* at 3

n.1), the Commonwealth is ultimately liable for payment of the back pay awards. Thus, the ruling will not prevent the United States from obtaining the back pay awards on behalf of the discrimination victims.

Moreover, the question whether respondent Board had adequate notice and an opportunity to respond, as required by *Brandon* and *Graham*, is not of sufficient general importance to warrant review by this Court. The case involves an unique and complicated state funding scheme, presents circumstances that are unlikely to occur again (see Pet. App. 7 (court of appeals emphasizing "the particular facts of this case" as basis for ruling)), and an unpublished opinion that will not determine the resolution of any other cases. See Pet. App. 1, 2.

2. Petitioner also contends (Pet. 22-26) that, if the court of appeals correctly determined that respondent Board did not have adequate notice or opportunity to respond, the proper remedy is dismissal of the back pay claims for failure properly to join a necessary party.

This contention is not properly before the Court. Although petitioner raised this issue in the district court, he failed to do so in the court of appeals and it is therefore waived. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, the absence of a necessary party does not require that an action be dismissed. See Fed. R. Civ. P. 19(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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